

**PUBLIC UTILITIES COMMISSION**

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298



December 5, 2002

Alternate to Agenda ID# 714

**TO: PARTIES OF RECORD IN APPLICATIONS (A.) 98-02-017 AND A.98-04-048**

Enclosed is the Alternate Draft Decision of Commissioner Loretta Lynch to the Draft Decision of Administrative Law Judge (ALJ) Michael Galvin previously mailed to you.

When the Commission acts on this agenda item, it may adopt all or part of it as written, amend or modify it, or set aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Public Utilities Code Section 311(e) requires that an alternate to a draft decision be served on all parties, and be subject to public review and comment prior to a vote of the Commission. Rule 77.6(d), provides that comments on the alternate draft decision be filed at least seven days before the Commission meeting.

Comments on the alternate draft decision must be filed and served by Thursday, December 12, 2002. Reply comments must be filed and served by Tuesday, December 17, 2002.

Pursuant to Rule 77.3 comments shall not exceed 15 pages. Finally comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service. Please also provide an electronic copy of the comments to Trina Horner at [tah@cpuc.ca.gov](mailto:tah@cpuc.ca.gov).

/s/ CAROL A. BROWN  
Carol Brown, Interim Chief  
Administrative Law Judge

CAB:epg

Attacment

Decision **ALTERNATE DRAFT DECISION OF COMMISSIONER LYNCH**  
**(Mailed 12/5/2002)**

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application of Pacific Bell (U 1001 C), a Corporation, for Authority to Categorize Business Inside Wire Repair, Interexchange Carrier Directory Assistance, Operator Assistance Service and Inmate Call Control Service as Category III Services.

Application 98-02-017  
(Petition for Modification  
Filed June 11, 2001)

In the Matter of the Application of Pacific Bell (U 1001 C), a Corporation, for Authority to Categorize Residential Inside Wire Repair as a Category III Service.

Application 98-04-048  
(Petition for Modification  
Filed June 11, 2001)

**OPINION ON PETITION FOR MODIFICATION  
OF DECISION 99-06-053**

**I. Summary**

This order grants the Office of Ratepayer Advocates' (ORA) petition to modify Decision (D.) 99-06-053 to recategorize Pacific Bell's (Pacific) Residential Inside Wire Repair (RIWR) WirePro service option from Category III<sup>1</sup> to Category II<sup>2</sup> and to reset Pacific's RIWR WirePro ceiling rate from \$2.99 to \$1.20.

---

<sup>1</sup> A Category III classification is designated for fully competitive services.

<sup>2</sup> A Category II classification is designated for discretionary or partially competitive services.

## II. Background

D.99-06-053, among other matters, reclassified Pacific's Business Inside Wire Repair (BIWR) and RIWR services to Category III from Category II. We found Pacific's BIWR service to be one market with two payment options: WirePro<sup>3</sup> and Per-Visit.<sup>4</sup> A similar market situation, a single market with two payment options, was found to exist for its RIWR service. Included in rate changes authorized by that decision was an increase in Pacific's RIWR WirePro payment option to \$1.20 from \$ .60. Subsequent changes up to the current \$2.99 level were approved via the Commission's Advice Letter process for Category III services.

On July 19, 1999, ORA and The Utility Reform Network (TURN) filed a Joint Rehearing Application seeking a reversal of the Category III classification for Pacific's RIWR service. ORA and TURN alleged that the reclassification violated Pub. Util. Code § 1705<sup>5</sup> since the Commission failed to find that Pacific's RIWR service is offered in two different markets: WirePro and Per-Visit.

In our decision on ORA and TURN's rehearing application, we denied ORA and TURN's RIWR two-market allegation on the ground that the record does not support a finding that RIWR service is offered in two different markets.<sup>6</sup> We instead affirmed Pacific's RIWR market to be one market with two payment options. At the same time, we granted a limited rehearing to correct a legal error

---

<sup>3</sup> The WirePro option provides for customers to pay a monthly fee for diagnostic and repair of any future simple inside wire-related problems at no additional charge.

<sup>4</sup> The Per-Visit option provides for customers to pay an hourly charge for the diagnostic and repair of all simple inside wire-related problems.

<sup>5</sup> All statutory references are to the Public Utilities Code, unless otherwise noted.

<sup>6</sup> D.99-09-036, at p. 4 (1999).

by including a specific finding to that effect. Accordingly, we deleted and replaced D.99-06-053's Finding of Fact 49 to state that "D.93-05-014 [May 7, 1993] and Pacific Bell's tariff identify RIWR service as one market with two payment options, and we find this to be the relevant RIWR market."<sup>7</sup> We further clarified D.99-06-053's Conclusion of Law 15 to state that Pacific should be authorized to re-categorize its RIWR service to Category III from Category II because Pacific has demonstrated that it has insignificant market power in the RIWR market.<sup>8</sup> Neither TURN nor ORA pursued judicial review.

### **III. Petition**

On June 11, 2001, ORA filed a Petition for Modification (petition) of D.99-06-053 to 1) distinguish, for regulatory purposes, Pacific's RIWR WirePro insurance plan from Pacific's RIWR per-visit service; 2) recategorize Pacific's RIWR WirePro service option back to Category II from Category III and 3) reinstate the \$1.20 monthly ceiling rate for that service option. The petition appeared on the Commission's Daily Calendar of June 13, 2001. On July 11, 2001, Pacific, Verizon California, Inc. (Verizon), and TURN filed responses to ORA's petition. While TURN supports ORA's petition, Pacific and Verizon oppose it. The petition of ORA and responses of Verizon and TURN identified three issues for consideration: the timeliness of ORA's petition, the change in categorization, and the change in the ceiling rate. We first address the timeliness of the ORA's petition.

---

<sup>7</sup> *Id.* at p. 16 (1999).

<sup>8</sup> *Id.*

#### IV. Timeliness of Petition

Rule 47(d) of the Commission's Rules of Practice and Procedure (Rules) allows petitions to be filed within one year of the effective date of the decision proposed to be modified. If more than one year has elapsed, the petition must also explain why the petition could not have been filed within one year of the effective date of the decision.

Pacific contends that ORA's petition should be summarily denied because it is procedurally improper and substantively invalid. Pacific explains that ORA is seeking a complete reversal of prior Commission findings, on which ORA has argued and lost following an evidentiary hearing,<sup>9</sup> in its comments to a proposed decision,<sup>10</sup> and again on rehearing.<sup>11</sup>

Verizon also believes that ORA's petition should be summarily denied. Verizon contends ORA has not justified why the petition could not have been filed within one year of the effective date of the decision; that ORA merely reargues positions that the Commission previously considered and rejected; and that ORA provides no evidence to suggest that conditions have changed.

In this instance, ORA's petition is filed two years after D.99-06-053 was issued. ORA explains that it could not have filed its petition within a one-year time period because the series of pricing events that resulted in a 400% rate increase in the WirePro service option, which compelled ORA to file its petition,

---

<sup>9</sup> Consolidated Application (A.) 98-02-017, dated February 9, 1998 and A.98-04-048, dated April 21, 1998.

<sup>10</sup> ORA's concurrent brief filed in consolidated A.98-02-017 and A.98-04-048 on September 14, 1998, which resulted in D.99-06-053 (1999).

<sup>11</sup> ORA and TURN's joint rehearing application of D.99-06-053 filed July 9, 1999, which resulted in D.99-09-036 (1999).

occurred between July 1999 and March 2001. This series of pricing events started with an increase from \$.60 to \$1.20 in July 1999, continued with an additional \$.79 increase to \$1.99 on June 2, 2000, and culminated with an additional \$1.00 increase to \$2.99 on March 1, 2001. The first increase, a 100% increase in the rate, was authorized through the application process to bring the service rate above cost pursuant to D.99-06-053 and the latter two increases were authorized through the advice letter process.

TURN concurs with ORA that the petition could not have been filed within a year after the effective date of the decision. In its support for ORA, TURN explains that the extended time period for filing a petition is reasonable, given the two-plus years of price increases.

Contrary to the arguments of Pacific and Verizon, ORA has substantiated that the events causing it to file this petition occurred over nearly a two year time period, making it impractical for ORA to have filed its petition within a one-year time period. We concur with ORA and TURN and find that ORA's petition is timely filed.

For a petition to meet filing requirements, Rule 47(b) specifies that the petition concisely state the justification for the requested relief and that it provide specific wording to facilitate compliance with all requested modifications to a decision. Any factual allegations must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed. Allegations of new or changed facts must be supported by an appropriate declaration.

Even though ORA has complied with Rule 47(b), Pacific and Verizon contend that ORA's petition should be summarily dismissed. One primary reason, as both Pacific and Verizon assert, is that ORA employs the same arguments it has previously presented and lost in evidentiary hearings; in its

comments to the proposed decision; and again, upon rehearing. We decline to dismiss the petition before considering the gravity of the basis under which ORA petitions for a change in the categorization and ceiling rate of Pacific's RIWR WirePro service option.

## **V. Categorization**

ORA petitions to recategorize Pacific's RIWR WirePro service option on the grounds that the current Category III classification conflicts with the Commission's New Regulatory Framework (NRF) Decision (D.89-10-031, dated October 12, 1989). ORA takes this position on the basis that "Pacific clearly retains significant, if not exclusive, market power for its RIWR WirePro Plan service"<sup>12</sup> option.

The NRF Decision established a Category III classification for only those services of a Local Exchange Carrier (LEC) having or expecting to have insignificant market power in providing the service in each market it intends to serve. Concurrently, a Category II classification was established only for those services that are discretionary or partially competitive and for which the LEC retains significant, though perhaps a declining, market power. Hence, if ORA's significant market power contention is correct, then by definition, the RIWR WirePro service option must be reclassified.

ORA acknowledges that the pivotal issue in determining the appropriate classification is the relevant market, so that an accurate analysis of market power can be undertaken. ORA contends that the RIWR WirePro service option is a distinctly separate market from the RIWR Per-Visit service option. ORA

---

<sup>12</sup> ORA's June 11, 2001 petition, at p. 10.



contends that we erroneously concluded in Pacific's re-categorization application and in the joint rehearing application filed by ORA and TURN that Pacific's RIWR service consists of one market with two payment options. In support of its position that the Commission erred in D.99-06-053, ORA points to two developments since the Commission recategorized RIWR to Category III. First, ORA notes that Pacific's own tariffs distinguish between the RIWR WirePro service and the Per-Visit option. Second, ORA points to the significant price increases for Pacific's RIWR WirePro service option since D.99-06-053 was issued on June 10, 1999.

TURN contends that ORA's position is valid because Pacific has substantially increased its RIWR WirePro service rate, while keeping its RIWR Per-Visit service rate constant. This has occurred subsequent to recategorizing the entire RIWR service from Category II to Category III. TURN further alleges that this disparity in rate changes between the RIWR service options demonstrates that "Pacific surely enjoys significant market power in the residential inside wire repair insurance market, if not also in the one-time service call market."<sup>13</sup> TURN concludes that this price discrepancy has resulted in unfair exploitation of the market power mechanism, particularly in the case of the RIWR WirePro service option.

We agree with ORA that the definition of the relevant market is crucial to an accurate analysis of market power. We found in D.99-06-053 that Pacific's RIWR services is one market with two payment options, and that regardless of

---

<sup>13</sup> TURN's July 11, 2001 response to ORA's petition, at p. 2.

which payment option is selected by customers, these payment options are designed to solve the same problem: “faulty” residential inside wire.<sup>14</sup>

ORA offers a persuasive argument that the RIWR WirePro plan and the Per Visit Inside Wire Repair Service are two different kinds of inside wire repair services. According to Pacific’s own description of the WirePro service, subscribers pay a monthly fee for coverage, and Pacific will not extend such coverage unless the inside wire is working and meets Pacific’s standards:

Customers may subscribe to WirePro only at a time their inside wire is in working condition and meets the Utility’s standards.<sup>15</sup>

Pacific’s tariff makes clear that the WirePro service is not available to a customer already experiencing trouble with inside wire. Unlike the Per Visit Inside Repair Service, which is available to customers with existing inside wire problems, WirePro must be purchased before trouble with the inside wire arises. As ORA notes, if Pacific’s RIWR WirePro were simply a payment option of its repair service, a customer could call and obtain repairs on non-working inside wire, and “opt” to pay for it on a monthly basis under the WirePro plan. It is therefore clearly more than merely a separate payment option for the same service.

The significant rate changes in Pacific’s RIWR WirePro service since July 1999 – and relative lack of rate changes in Pacific’s Per Visit service over the same time period -- present further substantive evidence that the two service options are in fact distinctly separate markets. The WirePro rate was priced below cost

---

<sup>14</sup> D.99-09-036 at pages 5-6, order granting limited rehearing of D.99-06-053.

<sup>15</sup> Pacific Tariff Regulation No. 7.1.3.B.3 in Schedule CAL P.U.C. No D7

prior to 1999. The ceiling rate the Commission approved in D.99-06-053 was \$1.20 per month. Since ceiling rates are necessarily higher than cost, Pacific's cost of providing the RIWR WirePro plan in 1999 was, by definition, below \$1.20 per month. An increase in price above cost level, in itself, does not constitute an elevation of this service option to a realm above and beyond competitive levels. The current rate of \$2.99 per month, however, reflects at least a 150% increase over the WirePro ceiling established in 1999, which was set above cost. By comparison, Pacific has not changed the hourly charge for its RIWR Per-Visit option that we established in D.99-06-053. We believe that a 150% rate increase for one "payment option" compared with no increase for a different "payment option" for the same service makes a strong argument that the two "options" apply, from the consumer's perspective, to two different services.

ORA compares the 400% increase in RIWR WirePro rates with California's 6.1% inflation rate over the same period. While the inflation rate is not necessarily the sole benchmark for determining whether a competitive service rate is just and reasonable, increases of this magnitude over the inflation rate are a good indicator that rates are going up faster than costs are rising. At the very least, we would expect the comparisons to be on the same order of magnitude.

Based on this new evidence, we are not convinced, and therefore cannot affirm, that the RIWR WirePro service is the same service as Pacific's Per Visit service. In D.99-06-053 we determined that the relevant market included both WirePro and Per Visit services, and that Pacific lacked market power based on the theory that the elasticity of both supply and demand in that relevant market is high. In that decision, we concluded that, although there is no evidence that consumer "do it yourself" inside wire repairs meets a large portion of demand for RIWR, the "do it yourself" option is a reasonable and feasible enough option

for consumers to make the service highly demand-elastic. The rate increases in Pacific's WirePro service that we have observed since July 1999 lead us to now reach the opposite conclusion. We find it difficult to believe that a competitively-priced service could maintain a 400% price increase, or even a 150% price increase, in a market that reflects high elasticity of demand. Accordingly, we believe ORA has made a convincing showing that competition does not exist in the RIWR market, and that there exists a compelling need to recategorize Pacific's RIWR WirePro service option back to Category II from its current designation as a Category III type of service.

#### **VI. Ceiling Rate**

ORA previously acknowledged that Pacific's then existing \$ .60 RIWR WirePro service rate had been priced below cost. Additionally, ORA acknowledges the Commission's approval of a \$1.20 ceiling rate which takes into consideration that, while the RIWR WirePro service was priced below cost, the ceiling rate is by necessity adjusted to a level higher than cost. Accordingly, ORA does not object to the \$1.20 ceiling rate.

ORA does, however, assert that Pacific's current rate, which resulted from rate increases subsequent to D.99-06-053, violates Section 451 in that the rate can be demonstrated to be unjust and unreasonable. ORA contends that Pacific used its authority from D.99-06-053 to raise its RIWR WirePro service rate to a level in excess of its costs for that service and in excess of the actual California Consumer Price Inflation (CCPI) rate of 6.1% during the same time period. ORA further contends that "the ceiling rates Pacific now seems to be aiming for are those charged by other subsidiaries of SBC Communications, Inc., Pacific's parent

company.”<sup>16</sup> This contention is based on ORA’s computer search which found that a \$3.95 rate is being charged by SBC affiliates in Arkansas, Kansas, Missouri, Texas, and Oklahoma.<sup>17</sup>

ORA asserts that the current ceiling rate no longer bears any relation to Pacific’s cost and therefore substantially exceeds all objective gauges for measuring inflation.

ORA is petitioning the Commission to reinstate Pacific’s \$1.20 ceiling rate “Unless and until Pacific proves that its costs necessitate an increase”<sup>18</sup> through the Commission’s application process.<sup>19</sup> Pacific counters that its price increases were submitted to the Commission through the Advice Letter process in conformance with the Commission’s advice letter procedures for Category III services.

Pacific effected its two WirePro rate increases by filing two separate advice letters seeking a ceiling-rate adjustment to a level greater than five percent. No party protested these advice letters. Consistent with the Commission’s rules established in our 1989 NRF decision, a five percent or greater increase in the ceiling rate of a Category III service becomes effective upon 30-day advance notice and becomes permanent on the thirtieth day after the advice letter filing. Also according to that decision, for placement in Category III of services other than those detariffed due to federal preemption or statutory requirements, a local exchange carrier will have to establish that it has or is expected to have insignificant market power in provision of the service in each market it intends to

---

<sup>16</sup> Petition at p. 7.

<sup>17</sup> Paragraph 5 of ORA’s Declaration attached to its petition.

<sup>18</sup> Petition at p. 8.

<sup>19</sup> Petition at p. 13.

serve. See Alternative Regulatory Frameworks for Local Exchange Carriers (1989) 33 CPUC 2d 43, 125. Therefore, by virtue of the Category III designation, an advice letter rate change for such a service is considered, by definition, competitive and reasonable. A party may protest the advice letter on procedural grounds (i.e., if the rate change went into effect before the 30-day notice period has elapsed), but filing a protest would not have changed the fact that the designation of Pacific's Residential WirePro plan to Category III permits Pacific to continually raise prices for this service simply by filing more advice letters. While Pacific is correct that it filed its advice letters in conformance with the Commission's advice letter procedures for Category III services, we cannot conclude that ORA or TURN's lack of protest constitutes their tacit agreement that the rates are reasonable.

Pacific employed cost data based on a study which took place prior to D.98-06-053 in 1998 in order to substantiate the reasonableness of its initial rate increase to \$1.20 from \$ .60. As is explained on page 65 of D.99-06-053, we limited the level of that initial rate increase to balance our market and cost analysis with a concern for potential shocks to customers adversely affected by abrupt pricing changes.

We agree with ORA that the 150% rate increase for Pacific's RIWR WirePro plan subsequent to our 1999 recategorization of that service violates the statutory requirement of Public Utilities Code section 451 that rates be just and reasonable. One of our primary goals in setting a ceiling rate at \$1.20 per month for the WirePro service in 1999 was to mitigate any potential for rate shocks to residential consumers. That goal has not changed. Accordingly, we direct Pacific to reset the rate for its RIWR WirePro service back to \$1.20 until it can

demonstrate that the ceiling rate should be changed. Pacific may file an application to change the ceiling rate for RIWR WirePro service.

**VII. Comments**

The alternate draft decision of Commissioner Lynch in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Commission's Rules of Practice and Procedure.

Rule 77.3 of the Commission's rules of Practice and Procedure specifically requires Section 311 comments to focus on factual, legal, or technical errors in the proposed decision. In the process of citing such errors, the parties are required to make specific reference to the record. Comments that merely reargue positions taken in briefs are accorded no weight and should not be filed. Rule 77.4 further requires that comments which contain recommendations for specific changes to the proposed decision also include findings of fact and conclusions of law that are believed to support those changes.

**VIII. Assignment of Proceeding**

Henry Duque is the Assigned Commissioner and Michael Galvin is the assigned Administrative Law Judge in this proceeding.

**Findings of Fact**

1. The pivotal issue in determining the appropriate classification for a NRF service is in defining the relevant market so that an accurate analysis of market power can be undertaken.
2. The NRF Decision (D.89-10-031) established a Category III classification for only those services of an LEC having or expected to have insignificant market power in providing the service in each market it intends to serve.
3. Pacific's BIWR and RIWR services were recategorized to Category III from Category II, pursuant to D.99-06-053 on June 10, 1999 and affirmed by D.99-09-036 on September 2, 1999.



4. Pacific's RIWR service has previously been found to consist of one market with two payment options: WirePro and Per-Visit.

5. We affirmed in D.99-09-036 that regardless of which payment option is selected by customers, these payment options are designed to solve the same service problem, faulty residential inside wire.

6. Our D.99-09-036 affirmation that Pacific's RIWR services is one market with two payment options was based on the conclusion that payment options do not transform a single service into two different services.

7. In D.99-06-053 we determined that the relevant market included both WirePro and Per Visit services, and that Pacific lacked market power based on the theory that the elasticity of both supply and demand in that relevant market is high.

8. Pacific's tariff makes clear that the WirePro service is not available to a customer already experiencing trouble with inside wire.

9. WirePro must be purchased before trouble with the inside wire arises.

10. The Commission last set the ceiling rate for Pacific's WirePro service in 1999.

11. The Commission set Pacific's WirePro ceiling rate at \$1.20 per month in 1999.

12. Pacific's current WirePro rate of \$2.99 per month reflects at least a 150% increase over the WirePro ceiling established in 1999, which was set above cost.

13. Pacific has not changed the hourly charge for its RIWR Per-Visit option that we established in D.99-06-053.

14. It is unlikely that a competitively-priced service could maintain a 400% price increase, or even a 150% price increase, in a market that reflects high elasticity of demand.

15. Pacific used its authority from D.99-06-053 to raise its RIWR WirePro service rate to a level in excess of the actual California Consumer Price Inflation (CCPI) rate of 6.1% during the same time period.

16. ORA or TURN's lack of protest to Pacific's two advice letters raising the WirePro rates does not constitute their tacit agreement that the rates are reasonable.

17. The designation of Pacific's Residential WirePro plan to Category III permits Pacific to continually raise prices for this service simply by filing more advice letters.

18. Rule 47(d) permits the filing of a petition on a decision issued more than one year ago if in said petition it is explained why that petition could not have been filed within one year of the effective date of the decision.

19. ORA could not have filed its petition within one year because the pricing events prompting it to file the petition occurred over a two-and-a-half year time period.

### **Conclusions of Law**

1. A 150% rate increase for one "payment option" compared with no increase for a different "payment option" for the same service makes a strong argument that the two "options" apply, from the consumer's perspective, to two different services.

2. Pacific's RIWR WirePro is more than merely a separate payment option for the same service.

3. Competition does not exist in the RIWR WirePro market.

4. Pacific's RIWR WirePro service option should be recategorized back to Category II from its current designation as a Category III type of service.

5. The 150% rate increase for Pacific's RIWR WirePro plan subsequent to our 1999 recategorization of that service violates the statutory requirement of Public Utilities Code Section 451 that rates be just and reasonable.

6. Pacific should be directed to reset the rate for its RIWR WirePro service back to \$1.20 until it can demonstrate that the ceiling rate should be changed.

7. ORA's Petition for Modification of D.99-06-053 should be granted.

**O R D E R**

**IT IS ORDERED** that:

1. The June 11, 2001 Petition for Modification of Decision 99-06-053 filed by the Commission's Office of Ratepayer Advocates is granted as set forth above.

2. Application (A.) 98-02-017 and A.98-04-048 are closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

**CERTIFICATE OF SERVICE**

I certify that I have by mail and by electronic mail to those who have provided an electronic mail address; this day served a true copy of the original attached Alternate Draft Decision of Commissioner Lynch to all parties of record in this proceeding or their attorneys of record.

Dated December 5, 2002, at San Francisco, California.

/s/ EVELYN P. GONZALES

Evelyn P. Gonzales

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

\*\*\*\*\*

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.